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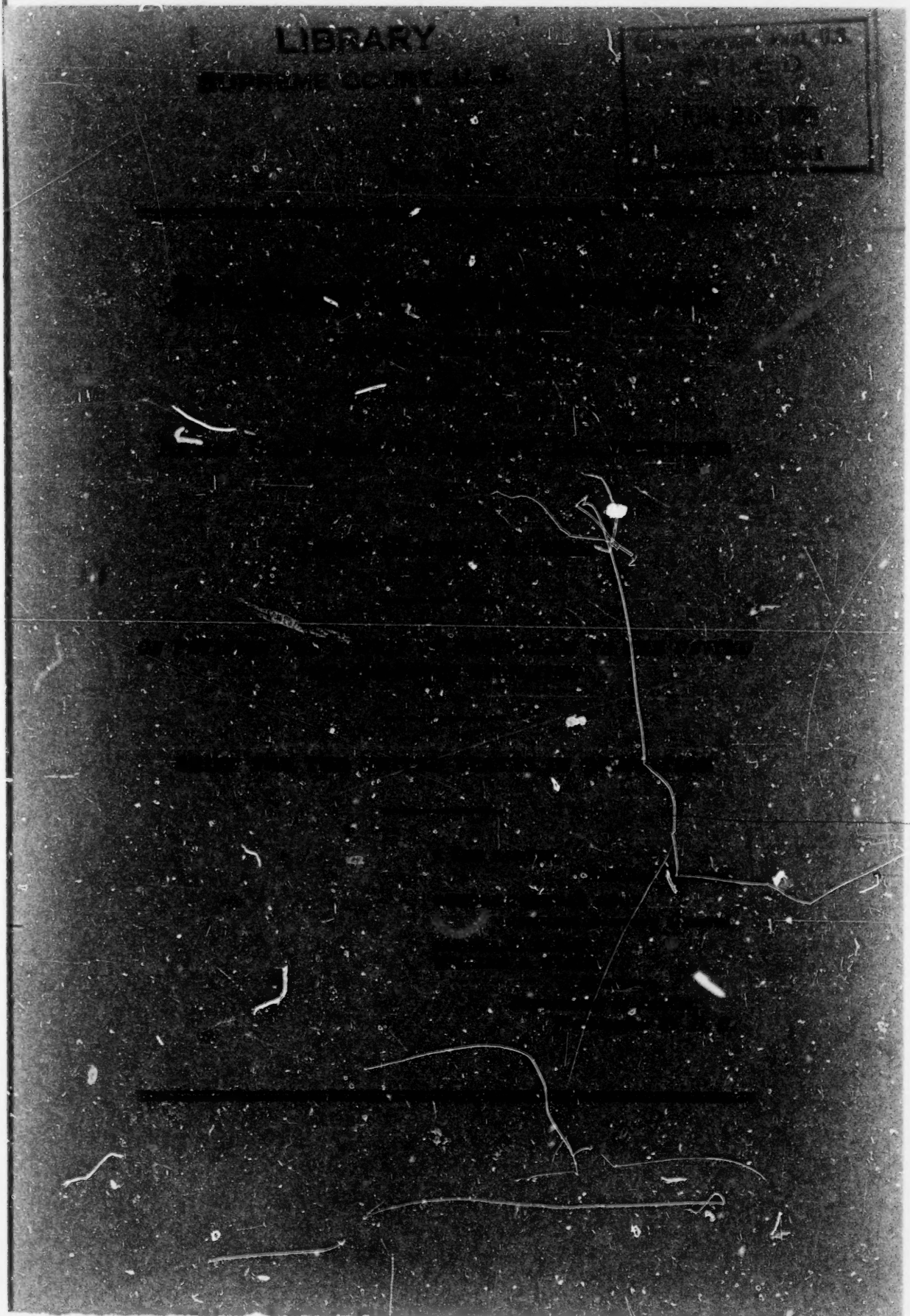

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1037

KAMEN SOAP PRODUCTS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Claims (Pet. App. 1a-2a), dismissing petitioner's independent action for relief from that court's decision of October 5, 1954, is not yet reported. The opinion in the original action, decided October 5, 1954 (Pet. App. 3a-29a), is reported at 129 C. Cls. 619, 124 F. Supp. 608.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. A petition for rehearing, timely filed, was denied on March 5, 1958. The petition for a writ of certiorari was filed on May 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Claims abused its discretion by relying—in dismissing petitioner's independent action to set aside a prior adverse judgment on its claim against the United States—on the fact that a prior motion by petitioner had requested the same relief on the same grounds and had been denied by the court after thorough consideration.

RULE INVOLVED

Rule 54(b) of the United States Court of Claims,[1] provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospec-

[1] The Rules of the Court of Claims were promulgated by that court on the authority of 28 U.S.C. 2071. Rule 54(b) is essentially identical to Rule 60(b) of the Federal Rules of Civil Procedure, promulgated by this Court on the authority of 28 U.S.C. 2072.

tive application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

STATEMENT

This action in the Court of Claims was brought by petitioner, under that court's Rule 54(b), *supra*, to set aside a judgment entered in a prior breach-of-contract suit in which the court had sustained the Government's special plea of fraud in the presentation of petitioner's claim and directed that the claim be forfeited in accordance with 28 U.S.C. 2514 (Pet. App. 1a, 3a, 29a). Petitioner alleged that the forfeiture judgment had been obtained by the use of false testimony of certain witnesses for the United States (R. 10). The Government's motion to dismiss was granted by the Court of Claims on the ground that the present action presented contentions which had been "thoroughly considered and passed upon" in connection with a prior motion by petitioner, filed under the same Rule 54(b) (Pet. App. 1a-2a).

The factual background of appellant's breach-of-contract claim is set forth in detail in the Court of

Claims report of the forfeiture judgment here in controversy.[2]

In brief, the following transpired: On May 28, 1947, petitioner was awarded a contract with the Army Quartermaster Corps to furnish a specified amount of powdered laundry soap (Pet. App. 3a). Subsequent to performance, petitioner sought an increase in the contract price of the soap on grounds of hardship and on the theory that Government market policies had resulted in increased costs of production (Pet. App. 9a-10a). After this relief was denied, petitioner contended that it had suffered losses by reason of the fact that the failure of Army officials to supply shipping documents had resulted in delays in production (Pet. App. 10a-12a). Petitioner's administrative claim on this ground was denied on the theory that the Army's failure to supply the shipping documents had not delayed production since at the time of the request for such documents petitioner neither intended to nor was capable of producing the soap (Pet. App. 15a). In an effort to obtain an administrative reversal of this denial of relief, petitioner supported its contention that it had intended to produce and deliver at the time of its request for shipping documents by submitting what purported to be a carbon copy of a letter, dated May 19, 1947, which allegedly had been submitted with its bid, as well as copies of various of its interoffice memoranda alleged to have been written in 1947 (Pet. App. 16a-18a). Petitioner's request for relief was denied finally on February 13, 1950 (Pet. App. 19a).

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[2] The opinion of the Court of Claims is set forth in petitioner's appendix. The court's detailed findings of fact may be found in the Court of Claims report. 129 C.Cls. 619, 645-714.

On March 13, 1950, petitioner filed suit in the Court of Claims, seeking damages for alleged breach of contract (Pet. App. 19a). The United States responded, filing a special plea in fraud pursuant to 28 U.S.C. 2514 (Pet. App. 25a).[3] This plea was based, in substance, upon the Government's contention that the carbon copy of the covering letter, and the inter-office memoranda, were manufactured evidence (Pet. App. 19a-25a). The original of the letter could not be found and Government witnesses testified that no covering letter was received when petitioner submitted its bid (Pet. App. 19a, 24a). Experts from the Federal Bureau of Investigation established, on the basis of their investigation and laboratory analysis, that the letter and memoranda submitted were not prepared in 1947, but at a later time (Pet. App. 19a-26a).

On October 5, 1954, the Court of Claims, after an extensive trial, concluded in a unanimous decision that no covering letter had been sent with petitioner's bid in 1947, and that the inter-office memoranda were prepared in 1949 rather than 1947 (Pet. App. 24a-25a). The Government's special plea in fraud was sustained, and petitioner's claim ordered forfeited (Pet. App. 29a). Petitioner's motion for a rehearing was denied on March 1, 1955 (Pet. App. 1a). 130 C. Cls. 818.

Prior to the decision of the Court of Claims on October 5, 1954, petitioner's president, A. L. Kamen, was

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[3] This statute provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
>
> In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

indicted in the United States District Court for the District of Columbia pursuant to 18 U.S.C. 1001, on the ground that he had falsely and fraudulently represented to the Department of Justice that he had transmitted with his bid the cover letter of May 19, 1947 (R. 8). The case came to trial on April 18, 1955 (R. 8). Several of the persons who had testified for the United States in the Court of Claims proceedings again gave evidence for the Government. These witnesses had testified in the Court of Claims as to their past recollection recorded, which was represented by an abstract or summary of bids and which showed that no covering letter dated May 19, 1947, had been submitted by petitioner with its bid (R. 5-7). This testimony was repeated at the criminal trial and there, for the first time, petitioner challenged the document on which it was based. (R. 8-9). It was urged that the abstract used by the witnesses was not an original document, that a signature of one of the witnesses was merely a stamped impression, and that it had not been shown that the abstract was a record kept in the ordinary course of business (R. 9). The District Court ordered a mistrial in the criminal action and the indictment was subsequently dismissed upon the Government's motion. It is this defect of proof, which petitioner brought out in the criminal action, which is the basis of its claim in the present case that the forfeiture judgment in favor of the United States was based on false testimony and therefore must be set aside (R. 10).

On August 30, 1955, petitioner filed a motion in the Court of Claims pursuant to Rule 54(b) of that court, *supra*, requesting relief from the judgment of October 5, 1954, on the ground that it was based on the court's finding that no cover letter accompanied the May 19,

1947, bid, and that this finding was based on evidence subsequently discredited in the criminal action (R. 16). A transcript of the criminal proceedings was filed in support of this motion.

The Government responded in the Court of Claims urging denial of the motion on the ground that the Government's plea in fraud, and the ensuing decision of the court, were based primarily on matters which were not involved in the criminal proceedings, *i.e.* the seven inter-office memoranda (R. 13-17). The Government's brief also contained an analysis of the disputed evidence, demonstrating that the difficulties encountered by Government counsel in the criminal proceedings formed no basis for the charge that the Court of Claims' findings and decision were based on false or incompetent evidence (R. 17-21). Petitioner's motion for relief from the prior judgment under Rule 54(b), was overruled by the Court of Claims on November 8, 1955 (Pet. App. 1a). 133 C. Cls. 966.

On December 26, 1956, petitioner filed the present independent action in the Court of Claims, pursuant to Rule 54(b) of that court, *supra*, asking to be relieved from the court's October 5, 1954 judgment, on the grounds asserted in its earlier Rule 54(b) motion (R. 1-12).[4] The court dismissed the action on the ground

[4] In the meantime, petitioner sought relief in the United States District Court for the District of Columbia. A complaint was filed on April 21, 1956, against the Secretary of Defense, seeking to set aside the judgment of the Court of Claims and asserting the same grounds for relief as those asserted in the Rule 54(b) motion and in the present action. The Government's motion to dismiss was granted by the District Court on November 6, 1956. Its judgment was affirmed by the United States Court of Appeals for the District of Columbia in a *per curiam* decision dated June 5, 1958 (No. 13,707), on the ground that it was appropriate to "leav[e] the decision of the issues to the Court of Claims."

that the matter had been "thoroughly considered and passed upon" in connection with the earlier motion (Pet. App. 2a).

ARGUMENT

In deciding that petitioner had been guilty of fraud in the presentation of its claim, the Court of Claims acted on a substantial body of convincing evidence. Subsequently, petitioner moved to set aside the forfeiture judgment entered against it on the basis of a challenge to a small part of this evidence. The challenge went more to the admissibility of the evidence than to its authenticity and was of a sort which could and should have been raised at the trial of the case. Nonetheless, the Court of Claims thoroughly considered the motion and concluded that it must be denied. Thereafter, petitioner, in the present independent action in the same court, reasserted the claim set forth in its motion and again sought to set aside the judgment which had been entered against it. Since no new considerations were presented, the Court of Claims, in denying relief, quite reasonably and properly relied upon its prior action with respect to the petitioner's motion. There is no merit to petitioner's contention that, in refusing to ignore its prior action, the court misconstrued its own rules. Equally lacking in merit is petitioner's underlying contention that it has been denied substantial justice in this case. The judgment of the court is clearly correct and presents no novel or important issue.

In considering and passing upon petitioner's motion under Rule 54(b), the Court of Claims had before it the briefs of the parties as well as the transcript of the criminal proceedings which revealed the so-called falsity of the testimony of Government witnesses. The

court was, of course, thoroughly acquainted with the underlying facts of the case, as its initial opinion amply demonstrates. Petitioner's contention, in its motion, related solely to the defectiveness of what was essentially documentary evidence. This being so, it was entirely appropriate for the court to rule on the motion on the basis of the written matter before it, without holding a trial. Petitioner argues (Pet. 9) that witnesses should have been heard, but fails even to suggest who these witnesses might have been or what light they might have shed on the issue before the court. The sole factual basis for petitioner's claim for the extraordinary relief which it sought was the defect of proof revealed in the criminal proceeding. The Government did not find it necessary to dispute this factual assertion. Instead, it relied on two arguments indicating that the defect was of no significance. The first was that the criminal indictment was based solely on the letter of May 19, 1947, whereas the forfeiture judgment of the Court of Claims was based primarily on the interoffice memoranda (see Pet. App. 25a-29a). Thus, even if the evidence of fraud in connection with the May 19 letter had been vitiated, there would have been no reason to upset the forfeiture judgment. But, secondly, the Government argued that the difficulties of proof encountered by Government counsel in the criminal proceeding did not in fact undermine the documentary evidence relating to the May 19 letter as it was used in the Court of Claims. In that court, no objection to the authenticity of the abstract of bids had been raised, even though it was quite plain that the document was not an original. Moreover, it has been suggested by the Government (R. 19) that the abstract could have been formally authenticated at the

Court of Claims trial if any challenge had been raised. Thus, there was no reason for the Court of Claims to doubt the probative force of the abstract of bids, which, together with the far more significant F.B.I. laboratory and investigative analysis, established the spuriousness of the letter. In addition to these arguments, the Court of Claims no doubt took into consideration the fact that the objection to the abstract of bids was readily apparent and thus should have been raised, if at all, at the trial of the case. See *United States* v. *Throckmorton*, 98 U.S. 61.[5] The Court of Claims was fully apprised of all these facts and theories, relevant to petitioner's motion to dismiss, before it decided that that motion should be denied.

In these circumstances, a *de novo* consideration of precisely the same issues would be an unwarranted redundancy. Yet petitioner claims that the filing of an independent action under Rule 54(b), *supra*, entitles it to such a reconsideration. Plainly, the rule itself does not create such an unprecedented right. While petitioner's contention has never before been expressly considered, Professor Moore clearly implies that the motion and the independent action provided for in the analogous Rule 60(b) of the Federal Rules of Civil Procedure are alternative remedies. See 7 Moore, *Federal Practice* (2d ed.), ¶¶ 60.31, 60.37. The purpose of the independent action is to provide a remedy where relief by way of motion is unavailable (chiefly

[5] A corollary of this proposition is the theory that a motion to set aside a judgment should not be permitted to be used as a substitute for appeal. See, *e.g.*, *Elgin Nat. Watch Co.* v. *Barrett*, 213 F. 2d 776 (C.A. 5); *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9).

because of lapse of time). Thus, where no new considerations are involved, the prosecution of a motion to set aside a judgment should be considered a complete bar to the subsequent filing of an independent action seeking the same relief.

However, assuming solely for the purpose of argument that this were not the law under Rule 60(b), it must be remembered that Rule 54(b) was promulgated by the Court of Claims pursuant to authority delegated directly to it by Congress. 28 U.S.C. 2071. The Court of Claims has chosen to follow the language of Rule 60(b) but it is free to interpret its own rules. Its interpretation of its rules is especially immune to challenge where, as here, the interpretation is reasonable, sensible, and fair.[6]

Furthermore, in the present case the Court of Claims has not gone so far as to lay down a rule that a motion and an independent action under Rule 54(b) are alternative remedies. It has merely said that in the circumstances of this case its prior action in disposing of the motion is dispositive of the issues raised by the independent action. Thus, this case does not actually present the legal issue upon which petitioner relies in seeking review by this Court.

Finally, it is well settled that the courts are vested with broad discretion with respect to the setting aside of judgments. See, *e.g.*, *Cole* v. *Fairview Development, Inc.*, 226 F. 2d 175 (C.A. 9), certiorari denied, 350 U.S. 995; *Stafford* v. *Russell*, 220 F. 2d 853 (C.A. 9); *Union Bleachery* v. *United States*, 176 F. 2d 517 (C.A. 4);

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[6] The fairness lies in balancing the interest of the losing party and the court in preventing injustices against the interest of the winning party in freedom from vexatious and repetitious litigation.

7 Moore, *Federal Practice* (2d ed.), ¶ 60.19. The facts of this case do not support a contention that the Court of Claims has abused its discretion in denying petitioner the relief which it has requested.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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